IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE
APPEAL FROM ORDER NO.27 OF 2006

Tukaram Bhikaji Gaikwad .. .. ..Appellant
Versus
Bapurao Nana Patil (deceased) .. ..Respondent

Mr.S.P.Thorat for appellant
Mr. Umesh Mankapure for respondent

CORAM : A.M.KHANWILKAR,J.

DATE : 8TH FEBRUARY, 2006.

P.C.:

1. Heard counsel for the parties. Perused the relevant materials on record. I see no reason to depart from the opinion recorded by the court below for refusing to set aside the order dated 6.9.2005 of dismissing the appeal for default.

2. Mr.Thorat relying on Rule 19 Order 41 of C.P.C. contended that the appellant had made out sufficient cause for setting aside the order of dismissing the appeal for default. The reason pressed before the court below by the appellant was that, on the relevant date i.e. on 6.9.2005 the appellant was unwell and could not attend the court proceeding. The case of the appellant is that he had engaged advocate and paid his full fees; for the mistake

of the advocate for his non-appearance the appellant should not be made to suffer. However, no affidavit of the concerned advocate was filed before the court below to justify as to what prevented the advocate on record for the appellant to not appear on 6.9.2005. Indeed, an attempt is made to file an affidavit of Mr.Prakash Dattatraya Kulkarni for the first time before this court. It is not possible to look into that affidavit, as this witness has not been made available for cross examination before the lower court. Morever, it is obviously an attempt to overcome the effect of cross examination of other witnesses examined on behalf of the appellant to support the case made out in the application.

3. The court below has rightly noted that the appellant was shown indulgence by the High Court by remitting the matter on setting aside the similar order for dismissal of appeal for default in the past. While passing such order the High Court had directed the appellant to proceed with the appeal on day to day basis after it is fixed for hearing without seeking any adjournment. Inspite of one indulgence shown by the High Court the appellant once again caused the appeal to be dismissed for default on 6.9.2005. The appellant moved

the lower court for setting aside that order. As mentioned earlier, on the ground that he was unwell on the relevant date and could not attend the court. In support of this plea Medical Certificates were presented by the appellant. As the Respondent contested the claim of the appellant, the parties were required to examine their respective witnesses. The appellant accordingly examined Dr.Nalawade in support of his plea. The evidence of Dr.Nalawade has been carefully analysed by the lower court and in my opinion the findings in para 20 of the impugned judgement that the version of Dr. Nalawade cannot be relied upon, is a possible view taken by the lower court. In para 20 of the impugned Judgment the lower court has noted the fallacy in the stand taken by the appellant as well in the version of Dr. Nalawade. The lower court has also noted that on the basis of material on record it was not possible to take the view that the appellant was incapacitated to appear before the court on the given date. The relevant portion of the corss-examination of Dr.Nalawade, in para 3 of the cross examination, is extracted as under :

> "Usually, I write down the entries completely whenever I take the entries in the case papers. Once or twice there had

been occasions since 1-2-2000 for me to advise complete bed rest to the said patient - Tukaram Gaikwad. It is my practice to mention in the case paper the fact that I have advised bed rest to the patient, in case I have advised the bed rest to the patient. It is true that I have not noted in the case paper relating to said patient Tukaram Gaikwad the fact I have advised a bed rest to the said patient, except in the entry dt. 2.9.2005. The entry dt.2.9.2005 regarding bed rest for one week bears my signature. It is true that the similar signatures are not made against the other entries in the case paper. It is true that the entries in the case paper pertaining to the said patient from 27.5.02 to 9.8.2005 are in the same hand-writing. It is true that the entries dt.2.9.2005 in the said case papers are in different inks. It is not correct to say that the entry dt.2.9.2005 is prepared subsequently and inserted in the case paper. It is not correct to say that the entry dt. 2.9.2005 contains overwriting and scoring out in respect of the complaint of the said patient. It is not correct to say that the contents in the said entry that about rest of one week and prescription are subsequently inserted in the said case papers. It is not correct to say that previously I was working as medical officer with the government. It is true that it is the general practice amongst the doctors and also my practice to take entry of issuance of any certificate of patient in the case papers. It is true that in the case papers, I have not taken entry regarding the examination of the said patient on 8.9.2005. It is not correct to say that I have falsely stated that on 2.9.2005 the condition of the said Tukaram Gaikwad was such that the bed rest was required to be advised to him and I had in fact advised bed rest to him. It is not correct to say that to help the applicant, I am giving this false evidence."

On the basis of the cross examination and the admission of the Dr. Nalawade referred to above, as mentioned earlier, the view taken by the lower court is a possible view. In such a case the question of showing indulgence to such litigant does not arise. I find no reason to show further indulgence for setting aside the order dated 6.9.2005.

4. Hence the appeal should fail and the same is dismissed. In view of this order, the civil application also stands dismissed.

5. At this stage the learned counsel Mr. Throat for the appellant submits that the appellant will carry the matter in appeal for which reason the decree passed by the court below may not be given effect. Counsel for the respondent opposes this requests. As the findings recorded by the lower court which I have confirmed, request made on behalf of the appellant is unacceptable and the same is rejected.